

COLORADO SUPREME COURT

2 East 14th Ave.
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2019-
2020 #293 (“Tobacco Tax Revenue for New State
Preschool Program”)

PETITIONER: Anna Jo Haynes,

v.

RESPONDENTS: Monica Vondruska and Jon
Caldara

and

TITLE BOARD: Theresa Conley, David Powell, and
Jason Gelender.

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Case No.: 2020SA136

THE TITLE BOARD’S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,378 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

s/ Grant T. Sullivan

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STATEMENT OF THE ISSUES

- 1) Whether the measure satisfies the single subject requirement.
- 2) Whether the title as set by the Title Board satisfies the clear title requirement.

STATEMENT OF THE CASE AND FACTS

Monica Vondruska and Jon Caldara (“Proponents”) seek to circulate Proposed Initiative 2019-2020 #293 (“#293”) to obtain the requisite number of signatures to place a measure on the ballot to add section 22 to Article X of the Colorado Constitution, and to amend certain statutory provisions in Articles 24 and 39 of the Colorado Revised Statutes. The proposed initiative creates a new preschool program by reallocating revenue generated by existing state taxes on tobacco products and tobacco litigation settlements.

The measure implements the new preschool program, in part, by redirecting certain state cigarette and tobacco tax revenue away from local governments that enact a ban selling tobacco or nicotine products and putting it towards the new preschool program. *Attachments to*

Petition for Review (“Record”) at 5-6 (proposed § 39-22-623(1)(a)(II)(A)).

The measure also reallocates a portion of the cigarette and tobacco taxes collected under article X, § 21 of the Colorado Constitution that are currently allocated to several health-related programs. Record at 2-4 (proposed Colo. Const. art. X, § 22(3)-(4) and proposed amended § 24-75-1104.5(1.7)).

The Board conducted an initial public hearing on April 1, 2020. The Proponents’ counsel stated at the hearing that #293’s single subject is to authorize the General Assembly to enable a state department to create and administer a Colorado preschool program funded by the reallocation of existing taxes and other revenues on tobacco and nicotine products.¹ The Board agreed that #293 contained a single subject and therefore proceeded to set a title.

Petitioner/Objector Anna Jo Haynes filed a motion for rehearing, asserting objections based on violations of both the single subject requirement and the clear title requirement. Record at 21-24.

¹ *Hearing Before Title Board on Proposed Initiative 2019-2020 #293* (Apr. 1, 2020), available at <https://tinyurl.com/y94s2876> (statement at minute 2:02:49).

The Board conducted a rehearing on April 15, 2020.² The Board denied Haynes' motion for rehearing in its entirety but made one technical change to its previous title. Record at 26. The title as fixed by the Board at the rehearing is:

An amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning a new preschool program that is funded by reallocating revenue generated by existing state taxes on tobacco and nicotine products, and, in connection therewith, requiring the state to create and administer the new preschool program, which must supplement existing preschool programs and funding, and reallocating from certain health-related programs and other state purposes portions of the following existing revenue sources: 1) taxes on tobacco and nicotine products; and 2) money the state receives from tobacco litigation settlements.

Record at 26.

Haynes filed a timely petition for review with this Court on April 22, 2020, raising both single subject and clear title arguments. Petition at 4.

² *Rehearing Before Title Board on Proposed Initiative 2019-2020 #293* (Apr. 15, 2020), available at <https://tinyurl.com/y9pc2k5n> (beginning at minute 2:09:58)

SUMMARY OF THE ARGUMENT

The Title Board's actions in setting title for #293 should be affirmed. The Board correctly determined that the measure satisfies the single subject rule because all of #293's provisions relate to the single subject of creating and administering a Colorado preschool program funded by reallocating existing taxes and other revenues on tobacco and nicotine products. The provisions redirecting public funds away from certain existing programs and entities to fund the new preschool program are not separate subjects, but rather mere implementing provisions.

The Board also properly exercised its drafting discretion in setting a title that complies with the clear title rule. The specific reallocation provisions cited by Haynes are not central features of the measure, but rather are discrete examples of several different funding provisions built into #293. To avoid adding undue length to the title, the Board properly avoided describing each and every funding provision and, instead, summarized their general categories.

ARGUMENT

I. The measure does not contain multiple subjects.

Haynes' petition alleges that #293 violates the single subject rule because it (a) reallocates certain unrelated funding and mandates its use on a preschool program; and (b) imposes a financial penalty on local jurisdictions that ban the sale of any nicotine or tobacco products.

Petition at 4. This Court should reject Haynes' arguments.

A. Standard of Review Preservation.

This Court's standard of review is deferential to the Board. "In reviewing a challenge to the Title Board's single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014). The Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*

Haynes preserved her single subject argument by raising it in her motion for rehearing. Record at 21-22.

B. The Board correctly found that #293 satisfies the single subject rule.

The Colorado Constitution provides that “[n]o measure shall be proposed by petition containing more than one subject.” Colo. Const. art. V, § 1(5.5); *see also* § 1-40-106.5, C.R.S. (2019) (addressing constitutional single subject rule). The single subject rule serves two purposes. *First*, it prohibits “the practice of putting together in one measure subjects having ‘no necessary or proper connection,’ for the purposes of garnering support for measures from parties who might otherwise stand in opposition.” *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I)). *Second*, the single subject rule seeks to prevent “surprise and fraud upon the voters” caused by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. *Amend TABOR 25*, 900 P.2d at 125; *see In re Title, Ballot Title, and Submission Clause for 2009-2020, No. 24*, 218 P.3d 350, 355 (Colo. 2009).

“The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re Title #76*, 333 P.3d at 79. “An initiative with a single, distinct purpose does

not violate the single-subject requirement simply because it spells out details relating to its implementation. As long as the procedures specified have a necessary and proper relationship to the substance of the initiative, they are not a separate subject.” *In re Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998).

Similarly, a measure does not violate the single subject requirement simply because it may have different effects on other provisions of Colorado law. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #90 & #93*, 328 P.3d 155, 160-61 (Colo. 2014). Such effects are “irrelevant” to whether the measure contains a single subject. *Id.* at 160 (quoting *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 274 P.3d 562, 568 n.2 (Colo. 2012)).

Here, #293 reallocates certain state cigarette and tobacco tax revenue that would otherwise go to local governments had they not enacted a ban on tobacco and nicotine products. Record at 5-6 (proposed § 39-22-623(1)(a)(II)(A)). The measure also reallocates a portion of the cigarette and tax revenue generated by article X, § 21 of the Colorado

Constitution that currently funds tobacco education, health, and cessation programs. Record at 2 (proposed Colo. Const. art. X, § 22(3)-(4)). The measure redirects a portion of those tax funds to the new preschool program created by #293.

These reallocation provisions are mere implementing provisions that properly relate to the single subject of creating and administering a Colorado preschool program funded by the reallocation of existing taxes and other revenues on tobacco and nicotine products. *See, e.g., Amend Tabor No. 32*, 98 P.2d 125, 129 (Colo. 1995) (implementation of a \$60 tax credit that applied to six state and local taxes constituted a single subject). The title set by the Board alerts voters that existing state cigarette and tobacco tax revenue will be reallocated from current programs to a new preschool program, preventing the “surprise” that may otherwise be visited upon voters if the title omitted the fact of reallocation. *In re Title #76*, 333 P.3d at 79. The reallocation provisions in #293 thus do not constitute an impermissible second subject.

Haynes’ petition also suggests that #293 imposes a financial penalty on local jurisdictions that ban the sale of tobacco or nicotine

products, creating an impermissible second subject. Petition at 4. But describing #293's reallocation provision as a "penalty" does not alter its fundamental character—it merely implements #293's creation of a new preschool program by redirecting existing tax revenues. Implementing provisions do not violate the single subject rule so long as they possess a necessary and proper relationship to the substance of the initiative. *In re Title #74*, 962 P.2d at 929. At most, #293 changes the effect of current law by redirecting state cigarette and tobacco tax revenue that would otherwise go to local governments had they not enacted a ban on tobacco and nicotine products. A measure does not violate the single subject requirement simply because it may have different effects on other provisions of Colorado law. *See In re #90 & #93*, 328 P.3d at 160-61. Accordingly, #293's reallocation of tax funds to a new preschool program does not constitute an impermissible second subject.

II. The Board's title for #293 is fair, clear, accurate, and complete.

Next, Haynes' petition asserts that the title set by the Board violates the clear title requirement because (a) it omits any reference to the new penalty imposed on local governments that ban tobacco and

nicotine products, and (b) it fails to inform voters that the reallocation of tax funds from health-related programs will result in “major funding reductions.” Petition at 4. This Court should reject Haynes’ arguments.

A. Standard of Review and Preservation

This Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). Instead, the Court grants “great deference” to the Board in the exercise of its drafting authority. *Id.* This Court reads the title as a whole to determine whether it properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board’s decision only if the titles are insufficient, unfair, or misleading. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d at 648.

This also employs “all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d 1071,

1076 (Colo. 2010). Only in a clear case will the Court reverse a decision of the Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Haynes preserved her clear title arguments in her motion for rehearing. Record at 22-24.

B. The Board’s title summarizes #293’s central features.

Section 1-40-106(3)(b), C.R.S. (2019) establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Among other requirements, the title must “be brief,” it must be in the form of a question which may be answered “yes/for” or “no/against,” and it must “unambiguously state the principle of the provision sought to be added, amended, or repealed.” § 1-40-106(3)(b).

The Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-02 #21& #22*, 44 P.3d 213, 222 (Colo. 2002). Rather, the

Board must summarize only the “central features” of the proposal. *In re Proposed Initiated Petitions*, 907 P.2d 586, 591 (Colo. 1995). In doing so, the Board must balance the need for brevity in the title against the need for completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d 853, 857 (Colo. 1994) (stating Title Board “must navigate the straits between brevity and unambiguously stating the central features”).

In this case, Haynes’ petition asserts that the reallocation of state cigarette and tobacco tax funds away from local governments that ban tobacco and nicotine products constitutes a central feature that must be included in the title. But this reallocation provision is not a central feature—it is just one of several funding mechanisms built into #293. *See Record at 2* (proposed Colo. Const. art. X, § 22(3)-(4), reallocating funds from tobacco education, cessation, and research programs, as well as health education, research, and treatment programs); *id.* at 3-5 (proposed amended § 24-75-1104.5(1.7), reallocating funds from tobacco litigation settlement moneys). Summarizing each and every funding

mechanism for #293 would add considerable length and complexity to the title.

The reduction in funds going to specific health-related programs is similarly not a central feature. As Haynes' own motion for rehearing pointed out, #293 reallocates funding from several health-related programs: the nurse visitor program, the University of Colorado Health Sciences Center's cancer research and capital construction, and programs that reduce youth crime and violence and child abuse and neglect, among others. Record at 24. Itemizing each and every program that would see reduced funding as a result of #293 would add significant detail and length to the title, contrary to the statutory requirement that titles "be brief." § 1-40-106(3)(b).

Rather than add undue length that may confuse voters, the Board sensibly elected to summarize only the general categories of reallocated funding sources and impacted programs: "taxes on tobacco and nicotine products" and "money the state receives from tobacco litigation settlements" that previously went to "certain health-related programs." Record at 26. This middle-of-the-road approach appropriately balances

the competing interests of brevity and completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d at 857.

Voters wishing to receive more detail about the reallocated revenue streams or impacted programs of course remain free to consult the Blue Book's summary that accompanies the ballot or the language of the measure itself.

CONCLUSION

This Court should affirm the Title Board's actions in setting the title for #293.

Respectfully submitted this 6th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCE and/or via U.S. first class mail at Denver, Colorado this 6th day of May, 2020, addressed as follows:

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